

Legislative and policy developments affecting children

Paula Proudlock,ⁱ Mbonisi Nyathi,ⁱ Lori Lake,ⁱ Mila Hardingⁱⁱ and Zita Hansungule-Nefaleⁱⁱⁱ

In this chapter we provide detailed analysis of four developments affecting children:

- The **National Health Insurance Bill** aims to create equitable access to health care services.
- The **Draft Admission Policy for Ordinary Public Schools** aims to address discrimination and exclusion in the admission process.
- The Constitutional Court has confirmed that section 10 of the **Births and Deaths Registration Act** is unconstitutional, obliging the Department of Home Affairs (DHA) to enable unmarried fathers to register their children's births without the mother's presence.
- The draft **Firearms Control Amendment Bill** aims to strengthen the Act and its enforcement to prevent the proliferation of illegal firearms and reduce gun-related deaths and injuries.

We analyse how these legal and policy developments affect children and provide recommendations to strengthen their design and implementation.

National Health Insurance Bill

The National Health Insurance Bill¹ was tabled in Parliament in August 2019. Public hearings began in May 2021 and were still in session at the date of publication of this chapter, due to the high volume of submissions received. The Bill aims to provide universal health care (UHC) for all. It includes a strong focus on maternal and child health, yet several amendments are needed to ensure that National Health Insurance (NHI) adequately covers the specific needs and vulnerabilities of pregnant women, children and adolescents.

There is growing evidence that early intervention during sensitive phases of development such as during pregnancy, the first 1,000 days of life, and adolescence is not only essential, but also the most cost-effective strategy to promote children's optimal health and development, stem the tide of non-communicable diseases, and disrupt the intergenerational cycle of poverty.²⁻⁴

This includes efforts to enhance access to and quality of services, as one in five children still travels more than 30 minutes to reach a health facility,⁵ and a lack of 'positive and caring attitudes'⁶ continues to undermine uptake of both antenatal care⁷ and adolescent health services⁸. It is therefore vital that the specific health care needs of pregnant women, children and adolescents are prioritised. Particular attention needs to be paid to the most vulnerable children – including neonates, adolescents, children with disabilities and long-term health conditions (LTHCs), undocumented children, and those living in rural areas and informal settlements – to ensure that no child is left behind.

Registration of users

The Bill provides that patients must have proof of registration to access health services under NHI. Registration can only be done at accredited health establishments. To apply for registration at an accredited health establishment, a person will have to provide biometrics, fingerprints, proof of residence, identity card, original birth certificate, or refugee identity card.

Children born to health service users are regarded as having been registered automatically when their births are registered with DHA, but older children will need to be registered by their parents or can register themselves from age 12 onwards. An original identity card, birth certificate or refugee identity card will be required for registration.

The proposed registration process and requirements pose a number of barriers:

- Babies and other children whose births are not yet registered may be excluded. Statistics South Africa's 2020 report on recorded live births reveals that of babies born in 2020, only 80% had their births registered within 30 days of their birth.⁹ And there are many children in South Africa without birth certificates – at least 500,000, of which 80% are South African citizens and 20% are foreign nationals.¹⁰
- Many public facilities serving poor, under-resourced and rural communities may not meet the standards for

ⁱ Children's Institute, University of Cape Town

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accreditation and therefore may not be able to register users, which may further prejudice those children most in need.

- Accredited facilities with limited staff and internet access will struggle to register users efficiently. This is likely to negatively affect rural populations in particular.

If the National Department of Health is committed to promoting health equity and UHC, then the current accreditation and registration requirements should be revised to ensure that they do not deepen existing inequalities in access to health care.

Quality, accreditation and inequity

Some of the measures in the Bill have the potential to exacerbate inequity, including user registration and the accreditation of health care facilities. The most recent report of the Office of Health Standards Compliance found that only five out of the 696 public health facilities surveyed met the norms and standards required for certification.¹¹

After more than two decades of public sector austerity, many public sector and specifically rural health care facilities are understaffed and under-equipped, and unlikely to qualify for NHI accreditation. Hospitals are more likely to be accredited than clinics and community health centres. Lack of accredited facilities at community level will discriminate against people most dependent on local facilities and is likely to increase the hospital centeredness of the health service.

Private facilities are not only more likely to get accreditation but are also overwhelmingly based in urban centres, so the accreditation process has the potential to further increase both urban-rural and private-public inequities. Furthermore, the fact that the Bill ignores the Certificate of Need contained in the National Health Act, which regulates where private service providers can open services, represents a key missed opportunity to improve equity. Considering all these factors, there is a strong possibility that the most vulnerable communities may not have access to NHI-funded health care at all.

Defining a package of basic health care services

Following concerns raised in response to the NHI White Paper,¹² the Bill includes a clause that specifically upholds the Constitutional right of all children to 'basic health care services'.¹³ But it is not yet clear how this right translates into a package of essential health care services for children and adolescents. It is therefore urgent to define 'basic health care services' and ensure that a comprehensive package of services is introduced that extends beyond a narrow focus on

survival and that also promotes children's optimal health and development. It is vital that the Benefits Advisory Committee includes and engages with experts in maternal, child and adolescent health to develop an essential package of care for pregnant women, children and adolescents. This must build on the work of the Committee on Mortality and Morbidity of Children under five years (COMMIC) who have developed a framework for an essential package of health care services for children that includes children with LTHCs and those requiring palliative care.¹⁴

The rights of foreign children

People eligible for NHI include South African citizens, permanent residents, refugees, inmates, and 'certain categories of individual foreigners determined by the Minister of Home Affairs, after consultation' with the Ministers of Health and Finance. Adult asylum seekers and illegal foreigners are entitled only to emergency medical services and services for notifiable conditions of public health concern, but the Bill upholds the constitutional right of all children, including children of asylum seekers or illegal migrants, to basic health care services. A challenge here is that many children of asylum seekers and illegal immigrants will not have the formal identity documents needed to register as users, so further detail is needed on how these children will access services.

It is not clear in the Bill whether the drafters of the Bill are interpreting children's constitutional right to basic health care services to include antenatal and obstetric care for their pregnant mothers. The Bill currently excludes pregnant adult asylum seekers from such services. Yet, these are key determinants of a newborn baby's health and survival, and both pre- and postnatal care are considered by the United Nations Committee on the Rights of the Child as an essential component of children's right to health.¹⁵ The Bill should therefore expressly provide that pregnant asylum seekers and illegal immigrants are entitled to antenatal and obstetric services.

Representation for child and adolescent health

The Bill requires the minister to appoint three advisory committees:

- The Benefits Advisory Committee will determine and review the health care service benefits and types of services that the fund will pay for, at each level of care from primary to tertiary hospitals.
- The Health Benefits Pricing Committee will recommend the prices of health service benefits.

- A Stakeholder Advisory Committee will comprise representatives from the statutory health professions councils, 'health public entities, organised labour, civil society organisations, associations of health professionals and providers as well as patient advocacy groups'.

None of these advisory committees are required to include representatives with expertise in maternal, child or adolescent health, raising concerns that children's specific needs may not be given sufficient attention. For example, the National Core Standards for Health Care Establishments pay little or no attention to children outside of neonatal and paediatric wards, despite, for example, the vulnerability of neonates and children in emergency department settings, and of adolescent patients when they move from paediatric to adult services. It is therefore vital that the specific health care needs of children and adolescents are justly and adequately represented on all NHI structures, to ensure a child-focused basket of care and formulary.^{iv}

The re-engineering of primary health care

The Bill commits to strengthening Primary Health Care (PHC) services and intends to make extensive use of community- and home-based services:

- PHC outreach teams will visit households regularly, provide health promotion and education, identify those in need of preventive or rehabilitative services, and refer them to the relevant PHC facility. The outreach teams will also facilitate community involvement and participation in identifying health problems and behaviours and implement interventions to address these problems at a community level.
- School health services will be provided to improve the physical and mental health and general well-being of school-going children, and
- Private providers will be included to increase capacity and access to care.

However, in the face of austerity budgeting, it will be hard to turn public services around after years of neglect, and promoting private sector provision will not necessarily address the critical needs in child health.

The original plans for PHC re-engineering also provided for the establishment of District Clinical Specialist Teams (DCSTs) to provide leadership and clinical governance for maternal and child health at district level. It is therefore of concern that there is no longer any reference to the DCSTs in the NHI Bill, as this investment in clinical governance is

essential to strengthen systems, improve coordination and ensure effective delivery of maternal, child and adolescent health services in response to the local burden of disease, and to drive intersectoral collaboration to address the social determinants of health.¹⁶

Similarly, the original plans to re-engineer rehabilitation services at district level should be revived to address the needs of large and growing numbers of children with LTHCs and disability, especially those in rural areas.¹⁴

It is also vital that the NHI invests in sufficient numbers of community health workers, as well as their education, supervision and support, so that they are able to play a broader role in supporting families with young children and enabling children to not only survive but thrive, as outlined in the National Integrated Early Childhood Development Policy,¹⁷ Nurturing Care Framework³ and National Adolescent and Youth Health Policy¹⁸. Yet, it is currently not clear that the work of the ward-based outreach teams will be funded under the NHI. There is a risk that efforts to promote efficiency and a one-size-fits-all approach might compromise the quality of outreach services and fail to make adequate provision for time spent travelling long distances and/or supporting families in difficult circumstances, which is much harder to quantify than a simple diagnosis and medication.

Conclusion

It is vital that the NHI prioritises maternal, child and adolescent health, as early and sustained investment – starting in pregnancy and continuing into adolescence – yields the greatest lifelong returns. This requires strong leadership for maternal, child and adolescent health at district, provincial and national level, and adequate representation on the Advisory Committees to ensure that the unique vulnerabilities and specific health care needs of pregnant women, children and adolescents are explicitly addressed in both the formulary and baskets of care.

A similar process of engagement is needed with the Office of Health Standards Compliance to ensure that the national norms and standards are aligned with children's rights and best interests. Greater efforts are needed to drive improvements in the quality of care at clinics and hospitals serving rural and vulnerable children in particular, to ensure they can be accredited as part of the NHI.

Draft Admission Policy for Public Schools

The Minister of Basic Education, on 10 February 2021, called for comments on amendments proposed to the Admission

iv List of approved medicines

Policy for Ordinary Public Schools ('the Draft Policy'). The Draft Policy provides all Provincial Departments of Education and the governing bodies of all ordinary public schools with a framework for developing admission policies for schools. The proposed amendments have the potential to strengthen the legal framework governing school admissions through, amongst other things, taking into account court judgments^v regarding discriminatory admission practices.¹⁹

This write-up does not address all the proposed amendments made to the Admission Policy but highlights those issues with glaring defects that need to be remedied.

Administration of admissions

The Draft Policy does not clearly articulate the responsibility of Members of the Executive Council (MECs), as set out in section 3(3) of the Schools Act,^{vi} to ensure that there are enough school places so that every child who lives in their province can attend school.²⁰ Lack of space in school is a consistent problem for school placements each year.²¹ The failure to include this obligation of MECs in the Draft Policy misses an important opportunity to reiterate the obligations of MECs, which may enhance the accountability and oversight of MECs over the admission of learners into public schools – and ultimately better protect children's rights to basic education.²¹

Submissions made by the Equal Education Law Centre (EELC) and Equal Education (EE) further highlight the failure to address various problems with the administration system for admissions, which ultimately result in delayed placement of learners. These include:

- An absence of effective coordination and communication channels between education districts and schools.²² Such instances include cases where district offices struggled to adequately assist parents to find placements for their children because they did not retain databases of unplaced learners; these records were kept by the schools that applications were made to and that did not have space.
- Online application systems that are not user friendly and a lack of support given to the parents or caregivers who need to use the systems.²³
- A lack of prescribed timelines for the processing of admission appeals, resulting in parents and learners having to wait unacceptably long periods of time to receive feedback.²⁴

As part of the administration of admissions in public schools, clause 9 of the Draft Policy includes a list of instances in which discrimination is prohibited. These include race, gender, sex, marital status, ethnicity or social origin, colour, sexual orientation, age, disability, HIV status, religion, conscience, belief, culture, language, birth, immigration status or nationality or any other arbitrary ground. While the list is non-exhaustive, pregnancy is a glaring omission from the list,^{25, 26} as well as gender identity, sex characteristics, and documentation status²⁷.

Documents required for the admission of learners

Clause 15 of the Draft Policy, in relation to documents required for the admission of learners, requires parents to present birth certificates that have identity numbers. If the birth certificates are not available, then a written affirmation or sworn statement is required.

The requirement that the certificate must include an identity number creates a potential barrier to education, as many birth certificates do not have identity numbers – for example, in cases where children are born to non-nationals and, in some instances, where children are born to one South African parent and one non-national.²⁸ EE and EELC's proposed remedy to this defect is the removal of the reference to 'identity number'.²⁹

On the other hand, the inclusion of the option of submitting a sworn statement or affirmation for children who do not have certificates is a welcome development. The inclusion is a result of the case of *Centre for Child Law vs MEC of Education*, in which the High Court declared that excluding children without birth certificates from admission to school was unconstitutional.³⁰

Admission of learners who are not South African

Clause 20 of the proposed amendments requires non-citizens to provide a birth certificate and asylum visa, refugee visa or study visa when applying to public schools. The requirement to produce a birth certificate is problematic as often asylum seekers and refugees do not have their birth certificates with them due to the circumstances in which they had to flee their home countries.³¹ Other groups of non-citizens face similar issues. The Legal Resources Centre and EELC thus recommend that it be made clearer that the applicant is allowed to produce whatever documents they have when it is not possible to produce a birth certificate,

v The judgments include but are not limited to: *MEC for Education in Gauteng Province and Other v Governing Body of Rivonia Primary School and Others* [2013] ZACC 34; *Centre for Child Law and Others v Minister of Basic Education and Others* [2019] ZAECGHC 126; and *Federation of Governing Bodies for South African Schools (FEDSAS) v Member of the Executive Council for Education, Gauteng and Another* [2016] ZACC 14.

vi Section 3(3) of the Schools Act states that 'every Member of the Executive Council must ensure that there are enough school places so that every child who lives in his or her province can attend school'.

as is further elaborated on below regarding learners who are undocumented.³¹

Admission of undocumented learners

While many provincial education departments released Circulars in 2020 or 2021 informing schools of their duties to admit undocumented learners,^{vii} the circulars did not impose a specific duty for School Governing Bodies (SGBs) to amend their admission policies to reflect this change and to supply a copy to Heads of Department (HODs) for approval. Many schools therefore still expressly exclude undocumented learners in their written admission policies.

Clause 23 of the Draft Policy attempts to ensure that undocumented children have access to education without barriers through providing that 'schools are advised to admit learners and serve their education requirements irrespective of whether the learner or parent of a learner does not produce documents listed ... [in] this policy'. However, it is concerning that the term 'advised' is used as it may be interpreted by schools as a discretion. If such an interpretation is adopted, it contradicts the High Court order that 'directed' that all undocumented learners be admitted into public schools,³² and the fact that basic education is an immediately realisable right available to 'everyone'.³³

It has also been recognised by the United Nations Committee on Economic Social and Cultural Rights (Committee) that South Africa has not made sufficient progress to ensure access to education for undocumented children since 2018.³⁴ While the Committee welcomed the measures taken by South Africa to remove legal barriers, the Committee noted that there were still obstacles faced by undocumented children in accessing basic education.³⁴ Specifically, the Committee acknowledged that schools were still excluding undocumented learners.³⁴ South Africa is now obliged to report to the Committee to provide further information on progress made on the recommendation in its next periodic report which is due in 2023.³⁴ This was an important finding in recognising the inadequacy of the steps taken by South Africa thus far. These International Convention on Economic, Social and Cultural Rights (ICESCR) reporting obligations will hopefully inspire the government to prioritise the finalisation of the National School Admissions Policy and take further steps to ensure schools are aware of their legal obligations not to exclude or intimidate undocumented learners.

A further concern is clause 24 of the Draft Policy, which states that the 'Head of Department must hold the parents of undocumented learners accountable for acquiring birth certificates for their children'.³⁵ It has been clearly noted in court papers that children's lack of documentation is often not the fault of the parents or caregivers, but is a result of barriers faced at the DHA and its restrictive policies and/or practices.³⁶ It is, at this stage, important to note that it is not the Department of Basic Education's (DBE) responsibility to hold parents accountable for obtaining children's birth certificates; this is the job of the DHA. The DBE must instead ensure that schools are safe learning havens for children. It is essential to ensure that parents are supported to obtain their children's documentation rather than threatened or prejudiced in any way.³⁷

Conclusion

Provincial laws and policies require individual schools to review their admission policies on a periodic basis and then submit them to the HOD for approval. The Gauteng Admissions Regulations (2019), for example, provide that SGBs are required to review and amend their admissions policies and submit a copy to the HOD for certification within three months of the publishing of the regulations and every three years thereafter.³⁸ SGBs in Gauteng will thus be reviewing and amending their admissions policies in 2022 in line with the regulated three-year cycle. The review period for these SGBs is imminent.

Therefore, to ensure that SGBs have access to important guidance for their school admissions policies to conform with the Constitution, case law and best practice, finalisation of the National School Admissions Policy should have been one of DBE's priorities in early 2022.

Births and Deaths Registration Act (s10) declared unconstitutional

Naki v DG of Home Affairs 2018 (Grahamstown High Court)

In the 2020 issue of the *Child Gauge*,³⁹ we reported on the developments in the *Naki* case⁴⁰ which resulted in the High Court declaring sections of the Regulations to the Births and Deaths Registration Act (BDRA)⁴¹ unconstitutional. The High Court found that these regulations prevented an unmarried father from registering the birth of his child in circumstances where the child's mother was undocumented, deceased or

vii See Eastern Cape Department of Education Circular 2 of 2020; Kwa-Zulu Natal Department of Education Circular 21 of 2021; Northern Cape Department of Education Circular 12 of 2021; Limpopo Department of Education Circular 63 of 2021; Western Cape Department of Education Circular 53 of 2021. The North West Department of Education released Circular 17 of 2021 which is in blatant contradiction with the Phakamisa judgment and the constitutional rights of undocumented learners. The Circular states that undocumented learners should be admitted for a maximum of 12 months pending them acquiring documentation.

otherwise not present. The Court, however, disagreed with the Centre for Child Law's (CCL) arguments that section 10 of the Act was also a barrier to unmarried fathers, and the CCL subsequently appealed this part of the judgment to the full bench of the High Court.

Centre for Child Law v DG of Home Affairs 2020 (Full bench of the Grahamstown High Court)

The appeal was successful and section 10 of the Act was declared unconstitutional,⁴² because by requiring the mother's signed consent to the child taking the father's surname, it implicitly bars an unmarried father from giving notice of his child's birth in the absence of the mother. It held that this was discriminatory not only against the father but also against the child.⁴² The court ordered a 'reading-in' (substitution) as the appropriate remedy to remove the barrier created by section 10 and gave Parliament 24 months to amend the Act.⁴²

CCL v DG of Home Affairs 2021 (Constitutional Court)

CCL then approached the Constitutional Court for confirmation of the High Court's order of invalidity.⁴³ The DHA, entering the case for the first time, agreed that section 10 was unconstitutional but submitted that this unconstitutionality was not because it prevented an unmarried father from registering his child, but because the section restricted the father and child to using the surname of the mother.⁴⁴ This in turn infringed the father's right to equality and the child's right to their father's surname from birth. DHA submitted that by removing section 10 in its entirety, as well as the words 'subject to the provisions of section 10' from section 9(2), it would enable any father, irrespective of their marital status, to give notice and register the birth of their child.⁴³

The court noted that the constraints of section 10 affect all unmarried fathers as a category, in that it results in disadvantages for them which are not experienced by married fathers.⁴⁵ The court adopted a gender-neutral and marital-neutral approach by confirming the High Court's order of constitutional invalidity on the basis that section 10 unfairly limited the ability of an unmarried father to register his child and to pass his surname on to his child.⁴⁶ Section 10 irrationally discriminated between categories of people and, in the absence of a legitimate government purpose put forward by DHA for this discrimination, it was found to amount to unfair discrimination. In addition, it perpetuated stereotypical gender roles and the assumption that childcare is inherently a mother's duty. The court emphasised that it is

both parents who bear the primary responsibility to care for their child, as is provided for in the Children's Act 38 of 2005.⁴⁷

The court also found that section 10 perpetuates the notion of 'illegitimacy' by differentiating between children born in and outside of a marriage.⁴⁸ The Court has previously emphasised that children must be regarded as autonomous, albeit vulnerable, rights-bearers who are not mere extensions of their parents. Therefore, the unfair discrimination of children based on parental marital status conflicts with the principle that the best interests of the child are of paramount importance.⁴⁹ The court recognised that 'South African society is not homogenous, and it must be accepted that the concept of 'marriage' no longer retains its stereotypical meanings'.⁵⁰

The court accordingly found section 10 to be manifestly inconsistent with the rights to equality, human dignity and the best interests of the child, and ordered that it be severed from the Act with immediate effect.^{viii} The court also severed the proviso in section 9(2), which stated that section 9(2) was 'subject to the provisions of section 10'.⁵¹

The practical effect of this judgment is that, from 22 September 2021, with regards to birth registration law, unmarried parents are in the same position as married parents – either of them can give the notice of birth in terms of section 9 of the Act. They can do so under either the father's surname or the mother's surname, or the surnames of both the father and the mother joined together as a double-barrelled surname.⁵¹

Non-compliance with the court orders

Since the judgments, public interest organisations have attempted to implement the three court judgments on behalf of unmarried fathers and their children.^{ix} Their experiences are that DHA local offices are not complying with the court orders and, in 2022, are still not allowing unmarried fathers to give notice of the birth of their children, or to do so under their surname.

As a result, numerous vulnerable children remain without a birth certificate. These public interest organisations have written to the Minister of Home Affairs outlining what they have experienced at office level:

- a. Many local officials are unaware of the judgments.
- b. Some officials are aware but are unwilling to implement the judgments in the absence of a directive from the Minister, or unable to implement it due to the current computer programme and application forms not yet having been adapted in response to the judgments.

viii As of 22 September 2021.

ix Lawyers for Human Rights, Children's Institute, Centre for Child Law, and the Legal Resources Centre.

- c. Many officials are willing to implement the judgments only if the father provides a paternity test, which will cost him a minimum of R2,000 and is only available at state laboratories in urban cities, requiring long distance travel at prohibitively high cost for fathers and children.
- d. Some officials are willing to register the child if the father has a court order that declares the children to be 'in need of care and protection' in terms of section 156 of the Children's Act, but then only under the mother's surname.

New directive and application forms needed

For the judgments to be implemented in practice, DHA needs to issue a directive to its local offices explaining the orders and their practical effect for applications by fathers. It should also amend its birth registration application forms, prescribed affidavits and computer programme, as they currently require the mother's signed consent. All managers and front-line officials would then need to be retrained and sensitised to the new approach.

The new system should follow the guidance provided by the Constitutional Court:

- The court commented on the concerns raised by DHA about the potential human trafficking if proper safeguards are not provided. The court was satisfied that section 9 1(A) provides sufficient protection against trafficking by providing that '[t]he Director-General may require that biometrics of the person whose notice of birth is given, and that of his or her parents, be taken in the prescribed manner'.
- The court stated that paternity tests may create insurmountable practical burdens for unmarried fathers and their children.
- The court noted that sections 7(1)(a) and (b) of the Act empower the Director-General to request further particulars where a suspicion is raised as to the validity of the parent's relationship to the child. However, the Court stressed that the contention that a married father can be trusted, whereas an unmarried father automatically raises suspicion, is ultimately a prejudicial approach because a married father can also falsify a marriage certificate and be a trafficker.⁵²
- Furthermore, the court stressed that it is important that any additional proof requested from an unmarried father must in reality be accessible to him for him to be able to meet this requirement. The implication of this part of the judgment is that DHA cannot insist on proof that an unmarried father cannot provide.

Conclusion

At the time of publication, a new Directive had not yet been issued by the national DHA to ensure that all its officials implement the court orders. As a result, thousands of children in the care of unmarried fathers remain without birth certificates

Draft Firearms Control Amendment Bill 2021

On 21 May 2021, the Civilian Secretariat for Police Service (CSPS) published the draft Firearms Control Amendment Bill 2021 for comment. The draft Bill proposes a number of amendments to the Firearms Control Act⁵³ that are aimed at strengthening the law and its enforcement.

The purpose of the amendments is to reduce the proliferation of firearms in society and, in turn, reduce gun-related criminal activity. Consequently, the draft Bill seeks to amend the purpose of the Act to 'restrict access to firearms by civilians and to comply with regional and international instruments of firearms regulations'.⁵³ The amendment which has sparked the most controversy is the proposal to remove 'self-defence' as one of the reasons why a person may apply for a licence to possess a firearm. This amendment is supported by Gun Free South Africa (GFSA), as research shows that the main source of illegal firearms in South Africa are legal firearms held by the state and civilians,⁵⁴ with civilians losing seven times more guns to criminals than the police.

The Children's Institute's (CI) relied on evidence on South Africa's high rates of child injuries and deaths when expressing its support for the Bill:⁵⁵

- The South African child murder rate of 5.5 per 100,000 children⁵⁶ is significantly more than double the estimated global rate of 1.6 per 100,000 children.⁵⁷
- The national homicide study found that just under 8% of all child murders were related to a firearm and that adolescents were most at risk,⁵⁸ while the Child Death Review project in the Western Cape revealed that firearms accounted for a much higher percentage of child murders (42%), with 88% of these firearm murders occurring in the 10 – 17 year age group.⁵⁹
- Among adolescents, females (24%) were more likely than males (21%) to be killed by a firearm and by a known person in the home.⁵⁸
- A third of firearm-related child deaths are linked to gang violence and mainly affect children 10 – 17 years of age. Younger children under the age of 10 years are mainly killed as innocent bystanders or caught in crossfire when killed by a firearm.

- Among adolescents, males are mainly killed in public spaces (61%) while females are more likely to be killed in the home by a family member or someone known to them (39%).⁵⁸ It was also shown that perpetrators were more likely to be younger males (under the age of 20 years).⁵⁸
- The dynamics in adolescent male homicides point to male perpetrators being young and often the victims are participants in the violence that results in their death, for instance engaging in fights that become lethal. While young women are mainly victims in their own home, with these murders driven by acts of gender-based violence.⁵⁸
- Children who are victims of gun violence or who witness gun violence experience negative psychological and physical harm and are likely to experience adverse outcomes later in life.⁵⁵

The CI therefore supported the amendments that are aimed at banning the ownership of guns for self-defence and making schools gun-free zones. The CI recommended that the age limit for obtaining a licence should be raised from 21 to 25 years and submitted that people with a history of violence should be more effectively prevented from holding a firearm licence.⁵⁵

The CI emphasised that the implementation of the new measures proposed by the Bill will help South Africa meet the Sustainable Development Goals related to the reduction of gender-based violence and the promotion of peaceful and inclusive societies, and, in particular, to significantly reduce all forms of violence against children.⁵⁵ In this regard, the CI supported the proposed amendment allowing the Registrar to temporarily suspend firearm licences of persons guilty of an offence under the Domestic Violence Act or the Protection of Harassment Act.

The publishing of the Bill resulted in 118,000 submissions, mainly from gun owners and pro-gun proponents opposing the Bill.⁶⁰ Much of this opposition stems from a lack of trust in the South African Police Service's (SAPS) ability to protect people from criminals, SAPS' history of not implementing the Act effectively, the many guns stolen from or lost by SAPS, and an un-proven belief that allowing civilians to possess guns for self-defence will enable civilians to protect themselves against criminals.

Gun Free South Africa's (GFSA) submission argues that while the right to self-defence is a universally recognised right, there is no universal right to own a gun for self-defence.⁶¹ GFSA also notes that there is no constitutional right to own a firearm in South Africa, and both the Supreme Court of Appeal⁶² and the Constitutional Court⁶³ recently

held that gun ownership is a privilege in our country which is regulated by law.⁶⁴ GFSA's position is supported by overwhelming evidence that shows that gun violence in South Africa has reached epidemic proportions and that guns have overtaken knives as the weapons used in most murders in the country.⁶¹ Sonke Gender Justice also raised similar concerns in its submission and revealed that the latest annual crime statistics from SAPS shows that every day, 23 people are shot and killed in South Africa.⁶⁵

Furthermore, Sonke Gender Justice supported all the clauses^x in the Bill that reduce the risk of legal guns being lost or stolen and falling into criminal hands by making provision for ballistic sampling of all privately-owned and state-owned firearms, strengthening the Central Firearms Registry and vetting of Designated Firearms Officers (DFOs).⁶⁵ This was also supported by GFSA, whose submission revealed that reducing access to firearms reduces gun violence, as global scientific research indicates that a gun in the home most endangers household members by increasing the risk of murder, suicide and death or injury from an unintentional shooting.⁶¹ GFSA also submitted that guns in the home are targeted by robbers and a comprehensive study in South Africa shows that civilian gun owners are the biggest source of lost and stolen guns.⁶¹ Sonke Gender Justice's submission refers to the decision in *South Africa Hunters and Game Conservation Association v Minister of Safety and Security*⁶⁶ where the court held that firearms are hazardous, that possession and ownership must be strictly controlled, and that failure by the licence holder to comply with the Act exposes the public to potential harm.⁶⁵

Following the volume of submissions received and the vocal opposition to the Bill expressed by gun owners and the pro-gun lobby, the Chief State Law Adviser has been requested to provide a legal opinion on the constitutionality of some of the proposed amendments, notably the removal of self-defence as a legal ground for obtaining a license and owning a firearm.⁶⁰ The Portfolio Committee on Police advised the CSPS to consult more widely on the Bill before it submits the Bill to Cabinet and then to Parliament.

Conclusion

The NHI Bill aims to enable equitable access to health care services and is desperately needed, but in its current form it is likely to fail some of the most vulnerable children: those in rural areas, those without birth certificates, and those born to undocumented non-nationals. Parliament will need to creatively re-design the Bill or refer it back to the Executive

x Clauses 21, 25, 58 and 64.

for re-design if it wants to ensure that the NHI can achieve equity in access to health care.

The Draft Admission Policy for Ordinary Public Schools should have been prioritised for finalisation in early 2022 to guide the re-drafting of provincial and school admission policies, and ensure that a range of court judgments are implemented at ground level. Further delays in its finalisation will result in continued non-compliance with court orders at school level.

While three court judgments oblige the DHA to allow unmarried fathers to register their children's births without the mother's presence, local DHA offices are not implementing

the judgments. A directive from national DHA and amended application forms are urgently needed to make the court orders a reality for thousands of unregistered children and their fathers.

The draft Firearms Control Amendment Bill aims to prevent the proliferation of illegal firearms and reduce gun-related deaths and injuries. Opposition by the numerically small but vocally strong pro-gun lobby threatens to delay this much needed reform. Increased public participation by the larger constituency that is negatively affected by gun-violence could balance the debate

References

1. B11-2019
2. Norris S, Lake L, Draper C. Child health matters: A life course perspective. In: Shung-King M, Lake L, Sanders D, Hendricks M, editors. *South African Child Gauge*. Cape Town: Children's Institute, University of Cape Town; 2019.
3. World Health Organization, UNICEF, World Bank Group. *Nurturing Care for Early Childhood Development: A framework for helping children survive and thrive to transform health and human potential*. Geneva: WHO. 2018.
4. World Health Organization. *Health for the world's adolescents: A second chance in the second decade. Summary*. Geneva: WHO. 2014.
5. Hall K. *Child health - Children living far from health care facility*. Children Count website. Cape Town: Children's Institute, University of Cape Town; 2019. Accessed: 5 May 2022. Available from: <http://childrencount.uct.ac.za/indicator.php?domain=5&indicator=49>.
6. Visser R, Bhana R, Monticelli F. *National Health Care Facilities Baseline Audit: National summary report*. Durban: Health Systems Trust. 2012.
7. Amnesty International. *Struggle for Maternal Health: Barriers to antenatal care in South Africa. Executive Summary*. London: Amnesty International. 2014.
8. Jana M, Mafa I, Limwame K, Shabalala A, editors. *Challenges to youths accessing sexual and reproductive health information and services in Southern Africa: A review of qualitative research in seven countries*. 5th Africa Conference on Sexual Health and Rights, Windhoek, Namibia, September; 2012.
9. Statistics South Africa. *Statistical release P0305. Recorded live births 2020*. Pretoria: Stats SA. 2021. [<http://www.statssa.gov.za/publications/P0305/P03052020.pdf>]
10. Centre for Child Law and Others v Minister of Basic Education and Others 2020 (3) SA 141 (ECG) (12 December 2019).
11. Office of Health Standards Compliance. *Annual Inspection Report 2016/17*. Pretoria: OHSC. 2018.
12. Department of Paediatrics and Child Health. *National Health Insurance White Paper and Child Health: Comment from the Department of Child Health and Paediatrics, University of Cape Town*. Cape Town: DPCH, UCT. 2016.
13. Constitution of the Republic of South Africa Act 108 of 1996. Section 28 1(c).
14. Department of Health. *1st Triennial Report. Ministerial Committee on Mortality and Morbidity in Children under 5 Years of Age in South Africa*. Pretoria: DoH. 2011.
15. Office of the High Commissioner of Human Rights. *Convention on the Rights of the Child, UN General Assembly resolution 44/25*. Geneva: United Nations. 1989.
16. McKerrow N, Doherty T, Coetzee M, North N, Bezuidenhout M, Rispel L. Building a workforce for a child- and family-centred health service. In: Shung-King M, Lake L, Sanders D, Hendricks H, editors. *South African Child Gauge*. Cape Town: Children's Institute, University of Cape Town; 2019.
17. Republic of South Africa. *National Integrated Early Childhood Development Policy*. Pretoria: Government Printers. 2015.
18. Department of Health. *National Adolescent and Youth Health Policy 2017*. Pretoria: DoH. 2017.
19. Centre for Child Law. *Centre for Child Law's Comments on the Department of Basic Education's Admission Policy for Ordinary Public Schools*. 2021.
20. Equal Education, Equal Education Law Centre. *Equal Education and Equal Education Law Centre's Joint Comment on the Department of Basic Education's Amended National Admission Policy for Ordinary Public Schools*. 2021. [<https://equaleducation.org.za/wp-content/uploads/2021/05/12.03.2021-eelc-ee-joint-comment-on-amended-admissions-policy-for-ordinary-public-school.pdf>]
21. Above EE and EELC, at p3.
22. Above EE and EELC, at p7.
23. Above EE and EELC, at p9.
24. Above EE and EELC, p10.
25. Above CCL submission, at p5.
26. Legal Resources Centre. *Submission to the Department of Basic Education on the Admission Policy for Ordinary Public Schools*. 2021. [<https://lrc.org.za/wp-content/uploads/submissions/2021%2003%2012%20LRC%20Submission%20on%20Admission%20Policy.pdf>]
27. Above LRC, at p3.
28. Above EE and EELC, at p24 and LRC, at p6.
29. Above EE and EELC, at p23-24.
30. Centre for Child Law and Others v Minister of Basic Education and Others 2020 (3) SA 141 (ECG) para 131.
31. Above LRC, at p7.
32. Centre for Child Law and Others v Minister of Basic Education and Others 2020 (3) SA 141 (ECG).
33. Section 29 of the Constitution and Centre for Child Law and Others v Minister of Basic Education and Others 2020 (3) SA 141 (ECG) para 94.
34. *Committee on Economic, Social and Cultural Rights (2021-104/CESCR/FU) (10 November 2021)*. [https://www.dailymaverick.co.za/article/2021-12-16-reflections-on-the-lack-of-progress-on-socio-economic-rights-25-years-after-the-enactment-of-the-constitution/?utm_term=Autofeed&utm_medium=Social&utm_source=Twitter#:~:text=committee%20released%20its-,observations,-Echoing%20many%20of]
35. Draft Admissions Policy clause 25.
36. Above LRC, at p26.
37. Above LRC, at p27.
38. Gauteng Schools Education Act, 1995 (6/1995): Amendments to Regulations Relating to the Admission of Learners to Public Schools, 2019 Regulation 3(3).
39. Proudlock P, Nyathi M, Jamieson L. Legislative Developments in 2019/2020. In: May J, Witten C, Lake L, editors. *South African Child Gauge*. Cape Town: Children's Institute, University of Cape Town; 2020.
40. Naki and Others v Director General: Department of Home Affairs and Another [2018] 3 All SA 802 (ECG).
41. Act 51 of 1992. The Grahamstown High Court declared aspects of regulations 3, 4, 5 & 12 unconstitutional.
42. Centre for Child Law v Director-General: Department of Home Affairs and Others 2020 (6) SA 199 (ECG).
43. Centre for Child Law v Director-General: Department of Home Affairs and Others [2021] JOL 51232 (CC).
44. Above CCL v DHA 2021 (CC) paras 22 – 24.
45. Above CCL v DHA 2021 (CC) para 39.
46. Above CCL v DHA 2021 (CC) paras 38 –46.
47. Above CCL v DHA 2021 (CC) para 46 and 79.
48. Above CCL v DHA 2021 (CC) paras 52 –74.
49. Above CCL v DHA 2021 (CC) para 76.
50. Above CCL v DHA 2021 (CC) paras 79 –81.
51. Above CCL v DHA 2021 (CC) paras 86 – 89.
52. Above CCL v DHA 2021 (CC) Paras 82 – 85.
53. No. 60 of 2000.
54. Gun Free South Africa. *The illegal firearms trade in South Africa. Firearms Control Briefing 3, 15 November. (Online)*. 2021. Accessed: 26 April 2022. Available from: <https://gfsa.org.za/2021/11/14/briefing-3-of-2021-the-illegal-firearms-trade-in-south-africa/>.
55. Jamieson L, Mathews S. *Children's Institute submission on the Draft Firearms Control Amendment Bill 2021*. 2021.
56. Mathews S, Abrahams N, Jewkes R, Martin LJ, Lombard C. The epidemiology of child homicides in South Africa. *Bulletin of the World Health Organization*. 2013;91:562-568.
57. United Nations Office on Drugs and Crime. *Global Study on Homicide 2019*. Vienna: UNODC. 2019.
58. Mathews S, Abrahams N, Martin LJ, Lombard C, Jewkes R. Homicide pattern among adolescents: A national epidemiological study of child homicide in South Africa. *Plos One*. 2019;14(8):e0221415.
59. Child Death Review 2019 Data. Children's Institute University of Cape Town.
60. Portfolio Committee on Police. *Minutes of the Portfolio Committee of Police 24 November 2021*. 2021. [www.pmg.org.za]
61. *GfSA Media statement (26 May 2021)*. [Available at <https://gfsa.org.za/2021/05/26/statement-welcome-draft-firearms-control-amendment-bill/>]
62. National Commissioner of Police and Another v Gun Owners of South Africa (561/2019) [2020] ZASCA 88 (23 July 2020).
63. Minister of Safety and Security v South African Hunters and Game Conservation Association [2018/ ZACC 14.
64. Norton Rose Fulbright letter to Civilian Secretariat for Police sent of behalf of GFSA dated 2 August 2021. See also GFSA media statement above.
65. Sonke Gender Justice submission on the draft Firearms Control Amendment Bill, 2021.
66. 2017 (2) SACR 288 (GP).